No. 89-266

Supreme Court, U.S.
FILED
DEC 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
STEVEN W. PARKS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the state tax assessed against petitioner, based on its contract with the Bonneville Power Administration to have electricity generated by petitioner transmitted over that agency's power lines in Montana, violates the Supremacy Clause, the Commerce Clause, or the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Arizona Public Service Co. v. *Snead*, 441 U.S. 141 (1979)	11, 13
Commonwealth Edison Co. v. *Montana*, 453 U.S. 609 (1981)	13
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977)	12
United States v. *Allegheny County*, 322 U.S. 174 (1944)	7
United States v. *City of Detroit*, 355 U.S. 466 (1958)	7
United States v. *County of Fresno*, 429 U.S. 452 (1977)	7
United States v. *Haukins County*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 109 S. Ct. 1638 (1989)	10
United States v. *Jackson County, Missouri*, 696 F. Supp. 479 (W.D. Mo. 1988)	10
United States v. *New Mexico*, 455 U.S. 720 (1982)	7, 16
Washington v. *United States*, 460 U.S. 536 (1983)	7

Constitution and statutes:

U.S. Const.:	
Art. I, § 3, Cl. 8 (Commerce Clause)	5, 6, 11, 12, 13, 14, 15
Art. VI (Supremacy Clause)	6, 12, 15
Amend. XIV	6, 14, 15
Due Process Clause	5
Equal Protection Clause	5

Statutes—Continued: Page

15 U.S.C. 391 ..... 5, 6, 10, 11, 13
16 U.S.C. 832c 2
16 U.S.C. 839c(c) 15
16 U.S.C. 839e(m) 12
Mont. Code Ann. (1989):
§ 15-23-101(2) 4
§ 15-24-1203 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-266

PORTLAND GENERAL ELECTRIC COMPANY, PETITIONER

v.

MONTANA DEPARTMENT OF REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is an investor-owned, Oregon corporation which provides retail electric utility services to customers located in the State of Oregon. Petitioner owns an undivided 20% interest in two coal-fired generating facilities, Colstrip Units 3 and 4, located in southeastern Montana. The remaining 80% interest in Colstrip Units 3 and 4 is owned by

four other utility companies which provide retail electric utility services to customers in a number of western States, including Montana.[1] Colstrip Units 3 and 4 began operation in October of 1983 and 1985, respectively. Pet. App. 14a, 22a-23a.

With the development of Colstrip Units 3 and 4, petitioner and the other Colstrip owners needed additional transmission capacity to carry electricity generated at the Colstrip facilities to the west, where their customers are located. The Colstrip owners took various steps to provide the necessary capacity. First, they converted existing transmission lines of lower voltage to a 500 kilovolt transmission line from the Colstrip generating plant to Broadview, Montana. Pet. App. 31a. Second, they built a double circuit 500 kilovolt transmission line from Broadview, Montana to a point near Townsend, Montana. *Id.* at 32a. Third, the Colstrip owners requested that the Bonneville Power Administration (BPA)[2] construct 500

---

[1] The other four owners of Colstrip 3 and 4 are Pacific Power & Light Company (which provides retail electric utility service to customers located in Montana, Idaho, California, Wyoming, Washington and Oregon), Washington Water Power Company (which provides retail electric services in Washington and Idaho), Puget Sound Power & Light Company (which provides retail electric services in western Washington), and Montana Power Company (which provides retail electric services in Montana). Pet. App. 22a, 30a.

[2] BPA markets power from the federal generation system in the Pacific Northwest, and it owns approximately 75% of the total transmission grid in the Pacific Northwest. Pet. App. 33a. Under 16 U.S.C. 832c, States, public power districts, counties, municipalities, and cooperatives are accorded preferential access to BPA power. Most of BPA's preference customers in Montana, including rural electric coopera-

kilovolt transmission lines west from Townsend, Montana to Garrison, Montana (the Montana Intertie line) and west from Garrison, Montana to Taft, Montana (the Garrison West line). *Id.* at 32a-33a, 53a. BPA agreed. The Montana Intertie line was completed in 1983; the Garrison West line, in contrast, was not completed until 1986. *Id.* at 53a. Prior to completion of the Garrison West line in 1986, the only 500 kilovolt line providing access from Garrison, Montana to the Idaho border was the BPA-owned line running from Hot Springs, Montana, to Dworshak, Idaho. *Id.* at 23a.

In connection with the construction of the Montana Intertie line and the Garrison West line, the Colstrip owners entered into long-term contracts with BPA. They acquired the contractual right to have BPA transmit Colstrip power over BPA's Montana Intertie line for a period of 22 years, with a right by the owners to renew at comparable terms. Pet. App. 37a-39a. They also entered into separate contracts for the transmission of power by BPA westward from Garrison. *Id.* at 23a.

Under petitioner's agreement, power would be transmitted from Garrison over BPA's "main grid" system to an Oregon substation. Pet. App. 23a. According to petitioner's report to the State, it had "a contract right to certain services provided by [BPA]" on the 500 kilovolt line between Hot Springs, Montana and the Idaho border. *Id.* at 16a, 25a.[3] Under

---

tives (REAs), receive BPA power after that agency transmits it over federal lines to interconnections with intermediate utilities which then carry the power to the cooperatives. Pet. App. 34a.

[3] Prior to the completion of the Garrison West line in 1986, a gap existed in the 500 kilovolt lines between Garri-

the contractual terms, moreover, after scheduling of Colstrip power over BPA's Hot Springs-to-border line began, petitioner was required to make monthly payments to BPA, regardless of the amount of electricity transmitted. *Id.* at 25a.

2. Montana imposes ad valorem property taxes on property owned by corporations. This tax is fully applicable to utilities; it specifically includes "electric power or transmission lines." Mont. Code Ann. § 15-23-101(2) (1989). In addition, Montana imposes a general beneficial use tax on private users of tax-exempt property—the tax is on "the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation." Mont. Code Ann. § 15-24-1203 (1989). In 1983, the Montana legislature amended this beneficial use tax statute to include explicitly electrical transmission lines of 500 kilovolts or more. As a result, the beneficial use tax specifically provides that "[t]he tax shall be imposed upon the possession or other beneficial use of an electrical transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax." *Ibid.*

3. The Montana Department of Revenue (DOR) assessed a beneficial use tax, for 1984, against the

---

son and Hot Springs. BPA's capacity to transmit Colstrip power between Garrison and Hot Springs was limited to 330 megawatts transmitted over 230 kilovolt lines. Pursuant to contracts, BPA reserved this lower transmission capacity to the five Colstrip owners, pending completion of the 500 kilovolt Garrison West line; the Colstrip owners allocated this capacity among themselves. and petitioner obtained the right to transmit 65 megawatts. Pet. App. 14a-16a, 23a-24a.

Colstrip owners. The basis for the assessment was the DOR's determination that the Colstrip owners had a beneficial use of BPA's Intertie line. Pet. App. 30a, 41a, 52a-54a. Similarly, for 1985, the DOR assessed an additional beneficial use tax against petitioner. The basis for that assessment was the DOR's determination that petitioner had a beneficial use of BPA's line from Hot Springs, Montana to the Idaho border. *Id.* at 14a, 16a, 25a.

The Colstrip owners brought suit in Montana state court challenging the tax assessment for use of the Intertie line on the ground that the tax violated the Supremacy Clause, both because it contravened principles of intergovernmental immunity and because it violated 15 U.S.C. 391, which prohibits state discrimination against electricity transmitted and generated in interstate commerce. They also raised objections based on the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as state law. In addition to being a plaintiff in that suit, petitioner also filed suit in Montana state court challenging the imposition of the beneficial use tax for use of the line from Hot Springs to the Idaho border. Pet. App. 21a-22a, 44a.

On December 21, 1987, the Montana state trial court rejected the Colstrip owners' claim regarding the imposition of the beneficial use tax for use of the Intertie line. Pet. App. 29a-50a. On January 19, 1988, the court similarly rejected petitioner's challenge to the use tax for use of the Hot Springs line, and relied on its decision in the prior case. *Id.* at 13a-20a.

On April 17, 1989, the Montana Supreme Court affirmed the trial court's decision regarding the tax on the Colstrip owners for use of the Intertie line.

Pet. App. 51a-70a (the Intertie decision). On May 10, 1989, moreover, the Montana Supreme Court affirmed the trial court's decision regarding the tax on petitioner for use of the Hot Springs line. *Id.* at 21a-28a (the Hot Springs decision). The court relied, in large part, on its analysis in the prior Intertie decision. *Id.* at 25a.

In this petition, petitioner seeks review of the Hot Springs decision. In a separate pending petition (*Pacific Power & Light Co.* v. *Montana Dep't of Revenue*, No. 89-364), petitioner and the other Colstrip owners seek review of the Intertie decision.

DISCUSSION

Petitioner contends that the assessment of taxes by the DOR for its alleged beneficial use in 1985 of BPA's 500 kilovolt line between Hot Springs, Montana and the Idaho border violates the Supremacy Clause, the Commerce Clause, and the Fourteenth Amendment. Because the Montana Supreme Court's decision rests on highly specific factual grounds and does not appear to present an issue of recurring significance, we do not believe that review by this Court is warranted.

1. Petitioner's claim under the Supremacy Clause is two-fold. Petitioner contends (Pet. 6-10) that the tax violates principles of intergovernmental immunity because petitioner did not operate, control or service the line, and petitioner's contract with BPA therefore did not confer on petitioner a beneficial use interest in BPA's line so as to permit taxation of such an interest. In addition, petitioner contends (Pet. 10-11) that the Montana tax violates 15 U.S.C. 391 by taxing only the beneficial use of high capacity 500 kilovolt electric lines, which are used to transmit electricity over long distances.

a. Under settled principles of intergovernmental immunity, it is well established that, in the absence of congressional consent, a State cannot impose a tax directly on the United States (*United States* v. *New Mexico*, 455 U.S. 720, 733 (1982)); cannot impose a tax the legal incidence of which falls on the United States (*United States* v. *County of Fresno*, 429 U.S. 452, 459 (1977)); and cannot impose a tax that operates to discriminate against the United States or those with whom it deals (*Washington* v. *United States*, 460 U.S. 536, 540 (1983)). It is equally well established, however, that "a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *United States* v. *County of Fresno*, 429 U.S. at 462. Such a tax must be nondiscriminatory (*id.* at 464; *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)), and it must not exceed the private party's interest in the federally owned property (*United States* v. *County of Fresno*, 429 U.S. at 462-463 n.10; *United States* v. *Allegheny County*, 322 U.S. 174, 186-187 (1944)).

The Montana Supreme Court cited these general principles. Expressly relying on *County of Fresno*, it stated, in the Intertie decision, that a "state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established" but that such a tax "must be imposed equally on others similarly situated." Pet. App. 54a. Similarly, in the Hot Springs decision that is the subject of this petition, the Montana court explicitly adopted by reference its reasoning in the Intertie decision (*id.* at 25a) and

again stated that a "tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace." *Id.* at 27a.[4]

In its decisions, the Montana court rejected the utilities' contention that a finding of possession, exclusive use, or control is necessary to support a beneficial use tax on the purported user of federal property (Pet. App. 26a, 55a), and undertook an extensive factual analysis to determine whether there is a sufficient use of federal property to justify imposition of the state tax. In the Intertie decision, the court determined that the Colstrip owners have "an enforceable contract interest which gives them the right to the beneficial use of firm * * * megawatts of power transmitted over the Montana Intertie line" (*id.* at 56a); that the Colstrip owners have "the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power" (*ibid.*); that the Colstrip owners' right is "subject only to the BPA's ability to transmit these amounts onward" (*ibid.*); that the "project scheduled power * * * remained under the ownership of the [utilities]" (*ibid.*); that the Colstrip owners have "exercised this right and used these lines to transmit power for their own commercial profit-making activities" (*ibid.*); and that the Colstrip owners are primarily responsible for the

---

[4] In both decisions, the court addressed the meaning of "beneficial use" in the context of interpreting the reach of the state statute (Pet. App. 26a, 58a); in both decisions, however, the court relied primarily on federal principles and authority regarding intergovernmental immunity in determining whether the tax on the "beneficial use" was permissible. *Id.* at 26a-28a, 54a-57a. See also *id.* at 44a-45a (in Intertie case, trial court addresses Colstrip owners' beneficial use argument as Supremacy Clause challenge).

total annual cost of the lines (*ibid.*). Similarly, in the Hot Springs decision, the Court found that petitioner "contracted for firm transmission capacity over the BPA lines" (*id.* at 26a); that it thereby received "an enforceable contract interest in firm megawatts of power" (*ibid.*); that "the power flowing through the lines remain[s] under [petitioner's] ownership" (*ibid.*); that petitioner "pays for the use of the lines regardless of the actual transmission flow" (*ibid.*); and that "the reservation of firm transmission demand grants [petitioner] an exclusive right" (*ibid.*). The Montana court's decisions thus rely on highly specific factual determinations.

Petitioner's principal intergovernmental immunity claim (Pet. 6-10) is limited in its scope. Petitioner's principal claim is not that the legal incidence of the tax falls on the federal government; nor is it that the tax impermissibly discriminates against those who deal with the federal government.[5] Petitioner's principal intergovernmental immunity claim, rather, is that "beneficial-use taxes may not be imposed on account of federal property unless the taxpayer possesses and controls the facilities subject to the tax" (Pet. 6) and that the Montana Supreme Court's rejection of this claim was erroneous (*ibid.*).

In light of the highly specific factual circumstances relied on by the Montana Supreme Court, however, petitioner does not present substantial reasons for this Court to address that argument and to review the Montana court's conclusion that a sufficient use of federal power lines existed to warrant state taxation of private use of those lines. Petitioner suggests

---

[5] In a footnote, petitioner summarily notes that the legal incidence and discriminatory application are "addressed" in the context of its other claims. Pet. 9 n.10.

that the Montana court's opinion will have wide-ranging consequences. Pet. 6-7. This prediction is belied, however, by the narrow, case-specific circumstances on which the Montana court relied. Accordingly, further review of this issue by this Court is not necessary at this time and in this case.[6]

b. Petitioner also contends (Pet. 10-11) that Montana's beneficial use tax violates 15 U.S.C. 391 because it taxes only beneficial use of lines with a capacity of at least 500 kilovolts, and does not tax beneficial use of lines with lower voltage. The statute provides that "[n]o State * * * may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity"

---

[6] Amici Pacific Gas and Electric et al. contend that the Montana court's decisions will have broad applicability, particularly regarding taxation of utilities who contract with the federal government. Amici Br. 1-6. To the extent that the Montana court's decisions may be given more far-reaching consequences than are apparent from the court's opinions and the petition, those developments can and should be addressed, on their merits, in subsequent litigation. The federal government, moreover, has not been a party to the litigation in the Montana courts; as a result, the federal government has not contributed to the development of the record as a party, and did not present its views of the intergovernmental immunity issue to the lower courts. By contrast, the two recent federal decisions relied on by petitioner (Pet. 9-10) were cases in which the federal government contributed to the development of the record as a party and presented its views of the intergovernmental immunity issue to the lower courts. See *United States* v. *Hawkins County*, 859 F.2d 20 (6th Cir. 1988), cert. denied, 109 S. Ct. 1638 (1989); *United States* v. *Jackson County, Missouri*, 696 F. Supp. 479 (W.D. Mo. 1988).

(15 U.S.C. 391); the statute defines a tax as "discriminatory" if "it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce" (*ibid.*). In *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979), this Court held that a New Mexico tax provision, which in effect gave a tax benefit only to electricity sold in New Mexico, violated Section 391. Petitioner maintains that Montana's use tax is similarly discriminatory because the restriction to lines of at least 500 kilovolts results in a greater tax burden on electricity that is generated and transmitted in interstate commerce.

Selective taxation of high voltage lines clearly has the potential to discriminate against electricity in interstate commerce. Again, however, the specific factual findings relied on by the Montana court suggest that the issue does not merit review in this case. In the Intertie decision, the court noted that one of the five utilities—Montana Power Company—is an "intrastate user" and that Montana Power "is taxed at the same rate as the other users of the facilities." Pet. App. 64a.[7] The court specifically distinguished *Arizona Public Service* because electricity sold to Montana consumers is treated no differently from

[7] The Montana Power Company (MPC), one of the Colstrip owners, is "a Montana corporation which provides retail electric service to customers located in Montana." Pet. App. 30a. Another of the Colstrip owners—Pacific Power & Light—also has customers in Montana (as well as five other States). *Ibid.* In the Commerce Clause part of its analysis in the Intertie decision, the Montana court noted that "MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines." *Id.* at 59a.

electricity sold to consumers in other States (Pet. App. 63a-64a). We are mindful that inclusion of an intrastate entity, or some intrastate consumers, does not necessarily validate a discriminatory tax. Nevertheless, the findings we have described counsel against the need for this Court's review in this case.[8]

2. Petitioner also contends (Pet. 12-24) that the beneficial use tax violates the Commerce Clause. Under settled Commerce Clause principles, a state tax is valid if it is applied to an activity that has a substantial nexus with the taxing State; if it is fairly apportioned; if it does not discriminate against interstate commerce; and if it is fairly related to the services provided by the State. *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). In the Intertie decision, the Montana Supreme Court addressed each of these factors. Pet. App. 58a-62a. In the Hot Springs decision, as on other issues, the court explicitly adopted by reference its analysis in the Intertie decision. *Id.* at 25a.

Petitioner's principal contention is that the tax discriminates against interstate commerce.[9] For the

---

[8] As an additional Supremacy Clause ground, petitioner asserts in a footnote (Pet. 11 n.13) that by authorizing "impact aid" payments to local governments with respect to major federally owned transmission facilities (16 U.S.C. 839(m)), Congress "appears to have intended" that the impact aid payments would be the sole source of revenue available to local taxing districts from federal transmission facilities. Petitioner fails to cite any evidence, however, in either the language of the statute or its legislative history, to support its suggestion that Congress intended the impact aid payments to pre-empt the imposition of otherwise permissible beneficial use taxes.

[9] Although petitioner suggests that the taxed activity lacks the requisite nexus to the taxing State (Pet. 12-13), the

same reasons that the Section 391 argument regarding discrimination does not require review, however, the argument under the Commerce Clause likewise does not warrant review. Indeed, Section 391 has been interpreted to impose a more stringent anti-discrimination requirement than the Commerce Clause. See *Arizona Public Service Co.* v. *Snead*, 441 U.S. at 152 (Rehnquist, J., concurring in the judgment). The Montana court applied the established Commerce Clause framework to the facts of the case; relying on *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), it found that impermissible discrimination had not been established because interstate and intrastate consumers are treated the same. Pet. App. 59a. The court's fact-specific determinations do not call for further review.[10]

Montana court correctly determined, in the Intertie decision, that the contracts to transmit the Colstrip owners' power from their in-state generating plants over lines within the State constitute sufficient nexus (Pet. App. 58a-59a), and the same analysis applies to the Hot Springs contract. Although petitioner also suggests that the basis for the tax "calls into question" the fair apportionment and fair relationship prongs, petitioner addresses those issues only "in the context" of its other arguments. Pet. 13.

[10] In addition to arguing that the limitation to lines of 500 kilovolts or more is discriminatory, petitioner claims that three other provisions reveal the State's discrimination. In fact, none of the three supports petitioner's claim. Petitioner first objects (Pet. 15-16) that rural electric cooperatives are taxed at 3% while investor-owned property is taxed at 12%; this general objection to tax rates applicable to non-exempt property is a fundamentally different claim from the challenge to the imposition of the beneficial use tax at issue here. Petitioner also objects (Pet. 17-18) to the differential treatment of rural electric cooperatives in a state statute authorizing a tax on federal property if Congress gives permission

3. Finally, petitioner challenges (Pet. 24-25) the Montana tax under the Fourteenth Amendment. Petitioner maintains that the tax violates due process and equal protection.

Petitioner's due process objection is that there is an insufficient nexus between it and the Hot Springs-Idaho border line to justify imposition of the tax. Pet. 24. In the Intertie decision, however, the Montana court responded to the due process argument by pointing out that, under its *Complete Auto Transit* Commerce Clause analysis in the Intertie opinion, the court had found a sufficient nexus between the object of the tax and the State to justify the tax, and a fair relationship between the tax and the services provided by the State. Pet. App. 66a-67a. In that analysis, the Montana court had found that nexus was satisfied because the utilities had contracted for the use of BPA lines in Montana to transmit power through Montana (*id.* at 58a-59a), and that fair relationship was satisfied because the tax was imposed on the basis of the activities within the State (*id.* at 62a). Petitioner fails to offer a substantial reason for reviewing these findings (either with respect to both decisions or solely with respect to the Hot Springs decision), or for finding a due process violation if these determinations stand.

---

to do so; since Congress has not given such permission, however, the state provision is not operative and its mere existence is weak support for petitioner's claim, even if it is otherwise relevant. Finally, petitioner objects (Pet. 18-19) to a 1987 amendment to the beneficial use statute; since that amendment post-dates the assessment at issue here, it is not relevant to the claim at issue. Petitioner's objections to the valuation methodology actually employed by the State (Pet. 22-24), moreover, present factbound issues that do not merit this Court's review.

Petitioner's equal protection challenge (Pet. 25) is based on the claim that the beneficial use tax is being administered in an unequal fashion. Petitioner contends that the tax is not being imposed on rural electric cooperatives and that it had not been imposed in the past unless a taxpayer had physical possession and exclusive use of otherwise exempt facilities. *Ibid.* In the Intertie decision, the Montana court rejected petitioner's equal protection challenge, noting that the possession of "firm transmission demands in 500 KV lines" reasonably distinguished petitioner from the rural electric cooperatives (Pet. App. 67a); the claim regarding possession and use, moreover, is essentially a recasting of the beneficial use intergovernmental immunity claim, and the Montana court's findings regarding a sufficient use are applicable. As with petitioner's challenges under the Supremacy Clause and the Commerce Clause, the Montana court's Fourteenth Amendment analysis rests on the particular factual findings in this case, and does not require this Court's review.[11]

---

[11] The legal claims by petitioner and the other Colstrip owners in the petition challenging the Intertie decision (*Pacific Power & Light* v. *Montana Dep't of Revenue*, No. 89-364) are similar to the claims in this petition. In that petition, the Colstrip owners explicitly state that the legal incidence of the tax falls on the federal government. Cf. note 5, *supra*. However, they merely assert, without explanation, that the "incidence" of the beneficial use taxes "is in part on BPA because of the 'exchange' provision of the Regional Act" (89-364 Pet. 16). Evidently, the Colstrip owners are referring to 16 U.S.C. 839c(c), under which the BPA must purchase electricity generated by privately owned utility companies at the average system cost of the utility's resources, and offer, in exchange, to sell an equivalent amount of electric power to the utility for resale to residential users

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID ENGLISH CARMACK
STEVEN W. PARKS
Attorneys

DECEMBER 1989

---

within the region. Under the decisions of this Court, however, it is clear that, even if the BPA may pay a higher cost to the utility as a result of the utility's having paid beneficial use taxes, that fact does not necessarily shift the incidence of the tax from the utility to the BPA. See, *e.g.*, *United States* v. *New Mexico*, 455 U.S. 720, 734 (1982).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 262203 676